

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Scott A. Lemieux,)
) File No. 16-CV-1794
) (JRT/HB)
Plaintiff,)
)
vs.) Saint Paul, Minnesota
) October 27, 2016
Soo Line Railroad Company,) 3:08 p.m.
d/b/a Canadian Pacific,)
) DIGITAL AUDIO
Defendant.) RECORDING TRANSCRIPT

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTIONS HEARING)

APPEARANCES

For the Plaintiff: HUNEGS, LeNEAVE & KVAS, PA
THOMAS W. FULLER, ESQ.
1000 Twelve Oaks Center Drive
Suite 101
Wayzata, Minnesota 55391

For the Defendant: STINSON LEONARD STREET
MARGARET M. BAUER REYES, ESQ.
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402

Transcribed By: CARLA R. BEBAULT, RMR, CRR, FCRR
316 North Robert Street
Suite 146 U.S. Courthouse
Saint Paul, Minnesota 55101

Proceedings recorded by digital audio recording;
transcript produced by computer.

IN OPEN COURT

MR. FULLER: Is that better?

1 THE COURT: And you can also raise the podium a
2 little bit as well to make sure that it's squarely lined up.
3 There you go.

4 MR. FULLER: I have never been told I was tall
5 enough.

6 THE COURT: Ms. Meyers will let us know if it's
7 not recording properly, but that should give you a pretty
8 reliable --

9 MR. FULLER: Thank you, your Honor. If you can't
10 hear me, just let me know.

11 And I would just like to address the Defense's
12 arguments that this is somehow a new claim absolutely
13 separate, distinct, discrete allegation that was never
14 before OSHA in the first place. And I will back up by just
15 briefly going through the facts and that involves
16 Mr. Lemieux's February 12th report of 56 bad brakes to the
17 Canadian Pacific. This is 56 railcars. So he reports 56 of
18 those cars, as part of his Class I federally-mandated air
19 brake test, were to what he thought in good faith to be bad
20 ordered or defective.

21 Subsequently on March 4th, as part of his next
22 duty and activities, Mr. Lemieux was stopped by track
23 detectors. He was on a separate train and the track
24 detectors flagged him and he was stopped by the dispatcher.
25 The OSHA complaint -- let me back up. Subsequently he

1 then -- what this Motion to Amend is about is then when he
2 stops his train and then he notices there's another bad
3 brake on that train on March 4th. Subsequently Mr. Lemieux
4 is brought up under investigation and he's terminated.

5 So the question here is --

6 THE COURT: But when you say subsequently, there
7 had been some investigative activity before March 4th after
8 the February 12th incident and before the March 4th.

9 MR. FULLER: Yes, your Honor. And that's when he
10 would have gotten the five-day suspension on his record.

11 THE COURT: Okay. Go ahead.

12 MR. FULLER: And it seems to me from the motion
13 papers of the Defense is that they are alleging that the
14 firing was never before OSHA so it would never have come
15 under the scope of the OSHA review. And to which the
16 Plaintiff would argue that on paragraphs 21, 23, 27, 28, 37,
17 and 43 of the administrative complaint before OSHA, which
18 was filed on behalf of Mr. Lemieux on August 14th, 2015, all
19 those paragraphs, your Honor, reference the termination and
20 the firing.

21 And I agree with the Defense in the sense that
22 that specific OSHA complaint -- and I know I'm going to hear
23 the argument, well, that complaint never referenced March
24 4th. It had nothing to do with March 4th. And that's where
25 I think we have to view the complaint broadly, liberally,

1 and see whether it would have come under the investigator's
2 review as he's investigating Mr. Lemieux's activity on
3 February 12th, the five-day suspension, and then not even a
4 month later where his track detectors on his train tripped
5 the car, then he finds -- and this is where I would like to
6 amend the complaint, your Honor -- he finds that there's
7 really one other car in there that he reports to the
8 dispatcher as being a bad ordered car.

9 And so I don't intend to raise any new causes of
10 action, which I think is key in this case. This is not a
11 new cause of action. The OSHA complaint has always alleged
12 that he was terminated for violating or that the termination
13 was in violation of the FRSA action. And that's the statute
14 where the railroad cannot retaliate against any of the
15 employees for engaging in a good faith report of hazardous
16 or unsafe conditions.

17 So I think it's important to look at the complaint
18 and construe it broadly at the administrative level and see
19 was that complaint, was that cause of action alleged? Yes.
20 He alleged that he was terminated for reporting bad brakes.
21 There were specific facts alleged for February 12th. I
22 would like to amend the specific facts to include in this
23 court that one extra additional report of bad brakes that
24 occurred on March 4th. The disclosures and the
25 investigating transcript revealed that there is a good faith

1 basis to amend in that regard.

2 Importantly, your Honor, I really also believe
3 that if we look at the *Brisbois* decision, which is what the
4 railroad seems to be relying most heavily on, the facts are
5 just extremely different and it's inapposite procedurally.
6 In that case before Judge Schiltz was a Motion to Dismiss.
7 Here I'm making a Motion to Amend. There was no Motion to
8 Dismiss filed by the railroad.

9 THE COURT: Well, but as a practical matter, isn't
10 the analysis I need to do to address possible futility
11 essentially the analysis that would have to be done in
12 connection with a Motion to Dismiss?

13 MR. FULLER: I would agree that an analysis would
14 overlap. And then actually in the *Brisbois* decision Judge
15 Schiltz does go through an analysis of the complainant's
16 duty to exhaust all remedies at the OSHA stage. And then
17 there's also law in there where the Court acknowledges that
18 those administrative complaints have to be interpreted
19 broadly, to which I would -- this is where I think the
20 *Brisbois* decision is distinct from this case -- and that is
21 there were eight allegations of retaliation in that matter.
22 And it was a Friday --

23 THE COURT: In other words, eight separate actions
24 taken by the employer that were alleged to have been
25 retaliatory?

1 MR. FULLER: Exactly. And that's where I think
2 this becomes different because I had always alleged the
3 five-day suspension turned into his firing. That was --
4 those allegations were always before OSHA. Always.

5 THE COURT: And what you want to add now, and the
6 question I think before me, is whether the additional action
7 on his part, additional protected activity or allegedly
8 protected activity on his part, is a trigger for the conduct
9 by the railroad should have been exhausted with OSHA, should
10 have been alleged specifically and exhausted with OSHA in
11 order to be brought here. I mean, isn't that the question?

12 MR. FULLER: It is in a sense that was it -- was
13 it brought. Is the firing -- was the firing brought? And
14 the firing is, yes. And part of the reason why I really
15 want to have this amended complaint is because I think the
16 Plaintiff and the Defendant are a little bit on different
17 grounds when it comes to what this case is really about.
18 And I just want to be very clear that this is about a
19 wrongful termination case and it always has been about a
20 wrongful termination.

21 And so I don't want to allege any additional
22 causes of action, but the fact. You know, if I was to see a
23 jury question, for example, on the Special Verdict Form, Did
24 Mr. Lemieux engage in a protected activity for reporting bad
25 brakes? Yes or no. And then the facts that will come to

1 the jury will include his activities on March 4th.

2 THE COURT: And I understand why you want to amend
3 the complaint and I understand the value of having it clear
4 what the case is about. And the question here is what
5 exactly the obligation to exhaust administrative remedies is
6 and whether that obligation requires specific and separate
7 allegations of the incidents of protected activity that you
8 eventually then hope to allege in District Court or not.
9 And I will ask the same -- the same question of Defense
10 Counsel and that is are you aware of any cases that have
11 looked at this -- you know, that have sliced the
12 administrative exhaustion issue in -- in this way and looked
13 at it from this perspective as opposed to separate acts on
14 the Defendant's part of retaliatory conduct?

15 MR. FULLER: I am not aware, your Honor. So the
16 cases that I would rely on heavily are those that are
17 construing those administrative complaints broadly in favor
18 of really what's just and right here.

19 THE COURT: Um-hum.

20 MR. FULLER: And that's where I think we can fall
21 on the prejudice that I think would be faced by the
22 Defendant, which really -- I don't think that there can be
23 any serious argument that this would be substantial
24 prejudice to the Canadian Pacific.

25 And the other point that I would like to highlight

1 which makes this a little bit unique is that the OSHA stage
2 really never did -- the proceeding never got off the ground.
3 And for that reason, I don't know. After this complaint was
4 filed, it sat dormant at OSHA for the 210 days.

5 THE COURT: Um-hum.

6 MR. FULLER: And it was never picked up. There
7 was never an OSHA investigator, to my knowledge, that called
8 and interviewed any of the participants, the witnesses for
9 the railroad. I believe Ms. Reyes will be able to correct
10 me if I'm wrong on that, but I was not involved in any of
11 that. There was a position statement submitted and that was
12 the extent of that investigation.

13 So it really -- there was really no investigation.
14 And I truly believe that had OSHA took this case up, it
15 would have come to the light that this discrete, you know,
16 report on March 4th happened, occurred. There's really no
17 dispute whether or not that did happen. And I think that
18 this would have been covered in OSHA's investigation.

19 And to the extent that the firing wasn't before
20 OSHA and the argument from the Defense on that, I would just
21 point the Court -- I believe I submitted this as an
22 attachment to my affidavit, and that would be footnote 7 of
23 their position statement where the railroad acknowledges
24 while in passing, Plaintiff alleged that the termination was
25 also a part of retaliatory conduct.

1 THE COURT: Um-hum.

2 MR. FULLER: So I believe in this situation when
3 you have the, you know, the rules of Federal Court to amend
4 the complaint and how that's supposed to be interpreted,
5 compared with the administrative liberality that under these
6 circumstances here, and the lack of prejudice that the
7 Defense would face, and that we can -- I would also note
8 that this is done within the Court's scheduling order. So,
9 you know, I did take a little -- I don't know if offense is
10 the right word but, you know, to say that this is lack of
11 diligence on the part of counsel, I just, you know,
12 respectfully disagree and really would ask the Court to
13 grant the motion.

14 And I'll address any questions if the Court has
15 any.

16 THE COURT: No. I asked you the questions I
17 intended to ask you. Thank you.

18 MR. FULLER: Thank you, your Honor.

19 THE COURT: All right. Ms. Reyes.

20 MS. REYES: Thank you, your Honor.

21 Good afternoon.

22 THE COURT: Good afternoon.

23 MS. REYES: May it please the Court:

24 Plaintiff claims that the OSHA complaint has
25 always alleged the termination was in violation of the

1 Federal Rail Safety Act. When the OSHA complaint in this
2 case is carefully considered, the OSHA complaint has raised
3 only the possibility that the termination would not have
4 occurred to Plaintiff but for the five-day suspension, which
5 is particularly -- and what I'm referring to here is the
6 five-day suspension -- which is particularly and in detail
7 presented in the OSHA complaint.

8 In this retaliation case, as your Honor has
9 already previewed, there is a difference between the adverse
10 action and the -- I should state that differently. There's
11 a difference in this retaliation case between other cases
12 that are based on other immutable protected characteristics
13 such as a race case or a gender case.

14 In this case central to the retaliation claim is
15 the existence of some alleged protected activity, which is
16 an element of a retaliation claim, and also, as we've
17 discussed, the adverse action is an element of that
18 retaliation claim.

19 Plaintiff submits that the intention of his
20 proposed amendments are to include additional protected
21 activity arising out of his job -- out of his job and his
22 report of unsafe brakes. And he also submits that his
23 intention is to include, quote, again additional facts
24 regarding the alleged activities of March 4th, 2015.

25 As he has argued to this Court just a few minutes

1 ago, he contends that this additional facts and these
2 additional allegations will not add any new legal theories
3 or change the underlying legal theories. But in this case
4 where an element, an essential element of this retaliation
5 claim is the protected activity, the complete absence of any
6 allegation of protected activity on March 4th of 2015 in the
7 OSHA complaint necessarily shows that now raising that
8 protected activity in a later District Court complaint
9 necessarily raises a new legal theory and a new cause of
10 action.

11 The proposed amendments present entirely new facts
12 that were never before presented. In the briefing we raised
13 that 17 factual paragraphs were referenced in the OSHA
14 complaint, 16 of which particularly and specifically
15 referred to events occurring on February 12th of 2015. The
16 17th paragraph was a very vague paragraph related to the
17 date on which Plaintiff started his employment with
18 Defendant.

19 THE COURT: Um-hum.

20 MS. REYES: That complaint put the Defendant on
21 notice, and put OSHA on notice, as to the scope of its
22 investigation that the only alleged protected activity was
23 that activity which had occurred allegedly on February 12th
24 of 2015. The new facts purport to allege, as I said, a new
25 independent and never before asserted protected activity.

1 THE COURT: Let me ask this. If the Plaintiff had
2 been more vague in the OSHA complaint and just said
3 something like I reported on multiple occasions, or I
4 repeatedly reported, or just I reported a number of
5 instances of bad brakes and thereafter I was suspended and
6 thereafter I was terminated, and I believe I was terminated
7 because, you know, ultimately terminated because I had
8 reported bad brakes, but had not been specific in the
9 complaint about precisely when those reports were, would the
10 complaint have failed to exhaust remedies? Or are you
11 saying his fault here was that he was too precise rather
12 than keeping it vague?

13 MS. REYES: That's an interesting question and
14 it's one that I have considered, your Honor. In this case
15 the vagueness of the allegations in the hypothetical that
16 your Honor raises would also cause the Defendant to have the
17 same concerns the Defendant has today. In fact, if the
18 allegations were so vague that the purported activity --
19 protected activity could not be identified, then there would
20 be the possibility of a motion, depending on what forum in
21 which we found ourselves, there would be the possibility of
22 a Motion to Dismiss for failure to state a claim in that if
23 Defendant could not identify when this purported activity
24 took place and had absolutely no idea how to investigate,
25 again, OSHA would not have any idea how to investigate or

1 how to analyze that complaint.

2 The same is true here. And maybe even more so,
3 your Honor. In *Parisi versus Boeing*, the Eighth Circuit
4 decision that Defendants cite in their brief, the court
5 warned that there's a difference between liberally read,
6 being an administrative charge that lacks specificity, and
7 inventing a claim which was simply not made.

8 In this case, as your Honor has noticed, and asked
9 of, this complaint was so detailed with respect to February
10 12th of 2015, and there was actually, and in fact the
11 possibility, and within Plaintiff's full knowledge of the
12 activities that he purportedly engaged in on March 4th of
13 2015, it was so detailed as to only the events of February
14 12th to the exclusion of any other events that allegedly led
15 to any protected activity on the part of Plaintiff.

16 Plaintiff asserts an all too general reading of
17 his OSHA complaint and one which, if accepted, will result
18 in the invention of a claim that was not asserted below at
19 OSHA. This results in not putting Defendant on notice of
20 the claim that only now Plaintiff purports to make against
21 Defendant; and also has deprived OSHA of the knowledge of
22 what Plaintiff now contends the scope of his case involves.

23 This fact and that discussion leads to and
24 supports the discussion of the futility of this proposed
25 amendment. The actions under the FRSA, as we know, are

1 subject to an administrative filing requirement that's as we
2 know of the administrative exhaustion requirement. That's
3 how we refer to it. In this case the only claim that was
4 exhausted at OSHA, and which is properly before this Court,
5 is that retaliation claim specifically arising out of
6 purported protected activity on February 12th of 2015, and
7 leading to or allegedly leading to and contributing to a
8 five-day suspension which was issued thereafter.

9 Again, a detailed reading of the complaint only
10 hooks in the termination for the possibility that he would
11 not have been later terminated for separate and independent
12 activity had he not had that five-day on his record.
13 There's no allegation that determination was directly
14 related to any protected activity, not even the February
15 12th of 2015 protected activity which is alleged in the OSHA
16 complaint.

17 And for that reason, Defendant dropped a footnote,
18 an explanatory footnote in the position statement at OSHA,
19 which was submitted on September 9th of 2015. So that was
20 one year ago, you know, 13 months ago or so. When Defendant
21 submitted the position statement and stated the termination
22 is not part of this retaliation case, and even if it were,
23 Defendant analyzed very briefly how that termination would
24 not and could not relate to the purported activity of
25 February 12th of 2015.

1 At that point -- and this goes to Defendant's
2 argument that Plaintiff has in fact unduly delayed this
3 amendment, not only before this Court but before OSHA,
4 because at that point -- and I would argue even prior to
5 that point -- Defendant was -- or Plaintiff was on full
6 knowledge and full notice that if there needed to be any
7 further detail or any further explanation supporting any
8 allegation that the termination was directly retaliatory for
9 any alleged protected activity, it was then. And Plaintiff
10 did not, after that submission of the position statement,
11 submit any additional details to OSHA, did not attempt to
12 amend the OSHA complaint, and did not thereafter even
13 respond to Defendant's position statement setting forth the
14 specifics of the argument that now we are hearing one year,
15 13 months, after the submission of that position statement
16 by Defendant, and in fact a year after the 180-day statute
17 of limitations have past.

18 To the futility argument, the exhaustion of
19 administrative remedies would bar this claim on a Motion to
20 Dismiss and Defendant would intend to move to dismiss if
21 this amendment were allowed. And in addition, the passage
22 of the 180-day statute of limitations would bar any
23 amendment of that complaint and therefore it adds an
24 additional reason why this amendment would be futile.

25 THE COURT: Is it Defendant's position that the

1 termination had nothing to do with that earlier five-day
2 suspension? In other words, that the termination was on
3 grounds that were completely independent of the fact that he
4 had been suspended for five days earlier?

5 MS. REYES: Your Honor, the -- there is a -- or
6 there was a discipline process at the time, but that process
7 for serious violations could be accelerated. In this case
8 the termination on the part of -- of Plaintiff actually
9 occurred with one of his co-workers. He and his co-worker
10 were both cited, investigated, and found to have engaged in
11 rule violations that led to their termination and they were
12 both terminated --

13 THE COURT: Um-hum.

14 MS. REYES: -- for the same activity. That would
15 lead -- there will be more discovery in this case where
16 Defendant will continue to investigate and Plaintiffs will
17 continue to request information. But it would be one of
18 Defendant's arguments that this termination would -- would
19 have been one of the instances in which it was a serious
20 violation for which --

21 THE COURT: Separate and apart from the previous
22 investigation?

23 MS. REYES: It would have to be analyzed still.

24 THE COURT: And if you haven't kind of
25 definitively determined your position on that, I don't want

1 to lock you into a position that you're not ready to take.
2 I didn't know whether it had already been established or at
3 the time of the termination it was clear one way or the
4 other.

5 MS. REYES: I don't want to --

6 THE COURT: That's fine.

7 MS. REYES: -- without further discovery --

8 THE COURT: That's fine.

9 MS. REYES: -- lock my client into that position.
10 But, again, the record shows that he was given the same
11 discipline that his co-worker was given.

12 THE COURT: And the co-worker had not been a part
13 of previous --

14 MS. REYES: The co-worker had not been a part of
15 the February 12th. That specific co-worker had not been a
16 part of the February 12th activities.

17 THE COURT: Okay. Let me ask you the same
18 question I asked Mr. Fuller. And that is are you aware of
19 any cases that have looked at this issue of whether
20 administrative remedies were exhausted where the -- in a
21 situation where the argument is -- or one -- I know you're
22 arguing that they've alleged separate retaliatory conduct as
23 well. Let me set that aside and just look at the
24 allegations of protected conduct. Are you aware of any
25 cases where the court has said that by adding an instance of

1 alleged protected conduct you need to be able to show
2 separately that that had -- that had been raised with the
3 administrative agency first before you get to bring it to
4 court?

5 MS. REYES: I wish I had them on the tip of my
6 tongue.

7 THE COURT: Do you think that there are such
8 cases?

9 MS. REYES: I believe that there are. And I don't
10 want to misrepresent to the Court, and if you would invite
11 us to submit any cases to the Court after this argument, I
12 believe Mr. Fuller and I could do that.

13 But I want to look closer to the *Walters* [sic]
14 case, which was cited in Defendant's brief and the facts of
15 which are just not at the top of my head right now, but that
16 case did involve a retaliation complaint and did involve the
17 Court denying the addition of a retaliation complaint that
18 was not fully set forth in the underlying administrative
19 charge.

20 Another item that is significant here is the case
21 law under the specific retaliation statute is very new and
22 is evolving. And so to the extent there is case law under
23 this specific statute, the *Brisbois* decision is a relevant
24 and very persuasive decision for this District Court. In
25 the *Brisbois* decision -- and I, again, understand your

1 Honor's distinction between the adverse action, an action
2 taken by the employer that's alleged to be retaliatory, and
3 the protected activity.

4 In the *Brisbois* decision, the adverse -- there
5 were a number of specific actions that Ms. Brisbois alleged
6 that the Defendant had taken against her which were not
7 originally raised in the OSHA complaint. But, again, that
8 is slightly different than the case law you have just
9 requested. However, it does show that if the Defendant is
10 not on notice of exactly what is being alleged against the
11 Defendant, that is a reason to find that the claim has not
12 been administratively exhausted.

13 And there is a specific paragraph in the *Brisbois*
14 decision that discusses the presentation of new facts
15 versus -- that may bolster those facts and those allegations
16 that are already in the administrative complaint, and the
17 presentation of an entirely new claim. And here, again, the
18 complaint was so specifically limited to the February 12th,
19 2015 activity that the facts now alleged for a completely
20 separate incident on a completely separate date with a
21 separate train, a separate crew and a separate happening,
22 are not tied into the February 12th, 2014 activity. And the
23 Defendant was not put on notice that there was any other
24 protected activity alleged in this case other than that on
25 February 12th of 2015, had no reason to look at it, had no

1 reason to think that it would be brought before OSHA.

2 THE COURT: Is that the purpose of the requirement
3 of administrative exhaustion, to put the Defendant on
4 notice, or at least a purpose of the requirement of the
5 administrative remedies?

6 MS. REYES: It's certainly one of the items that's
7 discussed in the cases that discuss exhaustion of
8 administrative remedies. I believe it was discussed in the
9 *Brisbois* decision and it was also discussed in the *Parisi*
10 decision as well where -- and in fact I believe in the -- I
11 almost want to grab my notebook back there where I have some
12 case notes. But there's a decision in Plaintiff's brief,
13 the *Popoalii* decision I believe is what it is. It looks to
14 be a little bit of a Greek-ish name, or something that I
15 obviously cannot pronounce.

16 THE COURT: Um-hum.

17 MS. REYES: But that decision as well I believe
18 discussed the fact that there was no notice to defend it.

19 When -- when we look at the prejudice to the
20 Defendant of this late amendment, and I think your Honor
21 understands that I dispute Plaintiff's statement that
22 because he brought the motion on the last day that he could
23 bring this motion that there has been no delay, I submit
24 that there has been delay because since March 4th of 2015
25 when Plaintiff allegedly engaged in this activity, Plaintiff

1 knew of the activities in which he had allegedly engaged.
2 There was a subsequent investigation under the terms of the
3 applicable Collective Bargaining Agreement where the
4 Plaintiff himself provided testimony stating that what
5 Plaintiff now alleges was his actions that support
6 additional protected activity. He himself brought that
7 information forward. He himself provided that information,
8 and therefore that information since March 4th of 2015 has
9 always been within the knowledge of Plaintiff.

10 Later he was --

11 THE COURT: But let me ask you this. How has
12 Defendant been prejudiced? I mean, is there -- are you
13 saying that evidence has been lost? I mean, the report -- I
14 would assume that if the report was made, there's evidence
15 the report was made. So other than the -- you know, other
16 than the aggravation, perhaps, of, you know, learning at
17 this point rather than some time previously that this is an
18 additional element of the Plaintiff's case, has there been
19 concrete prejudice as a result of his having -- of -- as a
20 result of his wanting to add it now rather than, for
21 example, when the complaint was filed?

22 MS. REYES: Yes, in these --

23 THE COURT: This complaint was filed.

24 MS. REYES: Exactly, the Federal District Court.

25 THE COURT: Yeah.

1 MS. REYES: Well, the OSHA complaint --

2 THE COURT: I'm not sure that there's case law out
3 there that tells me that I get to consider what happened
4 before the lawsuit got filed in terms of prejudice, is
5 there?

6 MS. REYES: I would submit that the Court in --
7 in -- in cases where there's an administrative exhaustion
8 requirement -- and I don't, again, have a case for you off
9 the tip of my tongue as you've requested -- but the Court is
10 required to consider whether the administrative remedy has
11 been exhausted.

12 THE COURT: But that's separate and apart from
13 prejudice, right? I mean, either it was exhausted or it
14 wasn't, and we're trying to deconstruct what exhaustion
15 means and -- but if I conclude it was -- if I conclude it
16 was not exhausted and should have been, it doesn't matter
17 whether you were or weren't prejudiced.

18 MS. REYES: And my -- my argument would go further
19 to say that these cases, where there's an administrative
20 exhaustion requirement prior to the Plaintiff coming to this
21 District Court and filing in District Court, that that case
22 does start at the beginning of the administrative case.
23 That case, in terms of the Defendant's, you know, analysis,
24 the Defendant's defense, the Defendant's preparations for
25 defending the case, starts at the point that the

1 administrative complaint is filed.

2 THE COURT: Um-hum.

3 MS. REYES: Again, I understand that later it is a
4 de novo review in this case and a different proceeding
5 before the District Court. But the preparations and the
6 groundwork for that case are laid, and especially where the
7 administrative piece is required, then there does -- I
8 believe there should be a consideration by the Federal Court
9 as to that period of time in which Plaintiff was required to
10 bring that administrative complaint prior to coming to
11 Federal Court.

12 And that's what happened in this case. One year
13 of -- more than a year now, it was in August 2015, complaint
14 before OSHA. Again, the Defendant -- there's a significant
15 amount of defense and work that goes into defending an OSHA
16 complaint. We don't know -- Mr. Fuller has mentioned that
17 OSHA "never really started the investigation." I don't know
18 at this point what OSHA did exactly, but I do know that
19 Defendant, from the day that they began -- from the day that
20 we received the administrative complaint, began defending
21 this case and submitted a pretty specific, well thought out,
22 and some people may say long -- I think it was 13 pages --
23 but a position statement in response to that administrative
24 complaint.

25 That position statement should have, and Defendant

1 should have had the opportunity to defend any of the claims
2 brought against it in that initial position statement. But
3 these claims were not brought against it at the OSHA
4 complaint. We can't go back and change that now. That's
5 how it is.

6 Again, to the -- to the point of OSHA, your Honor
7 asked whether notice to the Defendant is one of the reasons
8 for an administrative exhaustion requirement. Yes, it's
9 considered in the case law. Yes, I think that's one of the
10 practical reasons for it. And secondly, it's because
11 Congress has decided that OSHA, or whatever administrative
12 agency, should have the first stab at investigating the
13 complaint. And in this case OSHA was given a very discrete
14 cause of action. February 12th, five-day suspension.
15 Excuse me.

16 THE COURT: I do that all the time.

17 MS. REYES: Made the determination that very
18 vaguely, for no reason of direct protected activity, related
19 to the five-day suspension. In this case OSHA didn't have
20 the chance to consider whether this case was bigger than the
21 protected activity stated on February 12th of 2015 because
22 it was simply not in the complaint.

23 THE COURT: Okay.

24 MS. REYES: I think that we've covered all the
25 points that Defendant intended to cover. But just to be

1 clear, Defendant's arguments as we've discussed I believe in
2 quite a bit of detail here with the Court, is that there has
3 been undue delay by Plaintiff in bringing this motion and
4 that is one of the grounds for denying a Motion for Leave to
5 Amend the Complaint. The motion would be futile because of
6 the lack of administrative exhaustion and also because of
7 the fact that the 180-day statute of limitations has now
8 past. And this claim would -- this new and separate
9 independent claim based on the March 4th activity would
10 therefore be dismissible under Rule 12, and it will cause an
11 undue prejudice to Defendant in the ways that we have
12 discussed just recently.

13 THE COURT: All right. Thank you.

14 MS. REYES: For those reasons we would ask that
15 the motion be denied.

16 THE COURT: Thank you.

17 Mr. Fuller, you may respond, of course.

18 MR. FULLER: I have to be very clear about this
19 case. This is Mr. Scott Lemieux on February 12th who
20 reports 56 cars -- this is a train of 111 cars, and he
21 identified that there are bad brakes, unsafe brakes. The
22 railroad -- I also do FSLA cases. Whenever there's somebody
23 injured, you know what the defense is? The defense is he
24 could have reported it. Why didn't he report about that
25 slip and tripping hazard? Why didn't he say something about

1 that icy patch that he fell and he and hurt his back? If he
2 would have reported it, all he would have had to do was come
3 to us and we wouldn't have done anything wrong.

4 Mr. Scott Lemieux has the cars, 111 of them,
5 filled with hazardous material. Some of them empty, sure,
6 but there is still oil and hazardous material sloshing
7 around in there. And he is faced with a vague, ambiguous
8 rule about how -- that he's never trained on -- about how
9 thick these brake shoes should be. Okay?

10 And he takes his Leatherman out and he measures it
11 and he says to himself, Gosh, there's a lot of brakes on
12 here that are really unsafe looking to me. I have been
13 doing this for eight years. He's been a conductor with
14 nothing on his record, and he reports, knowing full well
15 what's going to happen, but he does so to save his own crew
16 members in the public. He's travelling down the St. Paul
17 yard. It's mountainous grade. In 1996 the Valentine's Day
18 massacre train derailment occurred right out here in the
19 St. Paul yard and he is aware of that, and so he's thinking
20 of this in the back of his mind, Do I want to be on a
21 runaway train with no brakes? Absolutely not. So what does
22 he do? He risks his job. He knows what the Canadian
23 Pacific is gonna to do. That's why they're up here
24 defending this termination so bad.

25 Because when I get in front of that jury and I

1 tell them this story about a man who has worked his life for
2 the railroad, he has reached his maximum capacity. That is
3 a blue-collar worker that identifies bad brakes that are
4 coming through your neighborhood and they are coming through
5 your town, and then he gets fired for it. He doesn't even
6 get a medal for it. He should have been commended for
7 identifying this issue.

8 THE COURT: But it's no question that the February
9 12 report is squarely -- it was squarely before OSHA and is
10 squarely before this Court. I mean, they are not moving to
11 disclose the entire claim. I mean, there's no question that
12 February 12 report is -- is in the mix here.

13 So the question is the obligation to exhaust
14 administrative remedies and what exactly it means.

15 MR. FULLER: And I understand that legal question.
16 I just think the background is important to what this leads
17 up to. Because if you really do look at the complaint, and
18 you look at it with, you know, intellectual honesty and did
19 the Defense have notice that bad brakes led to his
20 termination. Paragraph 21. Conductor Lemieux was found in
21 violation of GCOR 1.29, assessed a five-day suspension from
22 service, which resulted in his eventual termination.

23 Paragraph 27. It had always been about their
24 violation of Section 20109(b)(1)(A), which is that the
25 railroad cannot discriminate or suspend anybody for in good

1 faith reporting a hazardous safety or security condition.

2 So this is notice pleading. We can go back to law
3 school to think about, well, are you on notice and was it
4 exhausted? This complaint was squarely put before OSHA.
5 There's no additional cause of action, which I believe if
6 you take a close look at the case law you're going to see
7 that there are separate, distinct retaliations. And to
8 claim that they didn't have any notice, I would just think
9 this is all about reporting of brakes.

10 And your Honor asked the question about, well, if
11 I would have been more vague in the complaint where we would
12 be. So with giving them more specificity, they are trying
13 to use it as a sword. And I think this all needs to hinge
14 back on what's fair in this case. And you had asked counsel
15 what prejudice they suffered, and I don't believe the
16 question was ever answered. That's because there is no
17 prejudice. This is a case that has just gotten off the
18 ground. OSHA did no investigation whatsoever. Discovery
19 has just been sent by my office.

20 There is absolutely no prejudice that the Defense
21 can actually point to. I'm talking concrete prejudice.
22 There might be prejudice because it's going to be an
23 additional claim that's supported by the evidence. But, you
24 know, I think this complaint or this Motion to Amend really
25 could have been brought before the jury when the evidence

1 shows that.

2 So either way, the jury is going to hear about his
3 conduct on March 4th. The jury is going to hear about how
4 that related to his February 12th cause of action because,
5 as I allege in OSHA, it all related to his termination. And
6 the claim is going to be that they didn't follow their own
7 policy and the evidence is going to be overwhelming.

8 The Canadian Pacific at the time, and you heard
9 counsel just say this, that they had a five-day, ten-day,
10 thirty-day, dismissal. They skipped a lot of steps in
11 there. They went from a five-day suspension right to the
12 termination. And the reason why is because on March 4th, as
13 soon as he reported 56 brakes, this guy becomes a targeted
14 employee and he's being what's called on the railroad --
15 it's called bird dog or extra ops test. And so he's now
16 being focused on as someone who has reported bad activities.

17 And the temporal proximity -- I know the Defense
18 wants to create, you know, this long time gap. But February
19 12th to March 4th to April 13th, which was his termination,
20 is really going to support the temporal proximity in favor
21 of the Plaintiff. And so with all due respect, I would just
22 ask that the Court grant this motion and mainly because the
23 Defense cannot cite any unfair prejudice that it would
24 suffer. And I would like to thank the Court for its time
25 this afternoon.

1 THE COURT: All right. Thank you both.

2 I will take the motion under advisement and we
3 will get an order out as soon as we can. Thank you very
4 much.

5 (Court adjourned at 3:51 p.m.)

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9 I, Carla R. Bebault, certify that the foregoing is
10 a correct transcript from the digital audio recording of
11 proceedings in the above-entitled matter, transcribed to the
12 best of my skill and ability.

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15 Certified by: s/Carla R. Bebault
16 Carla Bebault, RMR, CRR, FCRR

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